## JUSOH v. NG AH SOOI & ANOR.

[O.C.J. (Suffian J.) January 12, 1963]

[Alor Star — Civil Suit No. 121 of 1962]

*Practice and Procedure — Statement of claim and reply — Allegation of 1st defendant's previous conviction — Application to strike out — Whether allegation tends to prejudice and embarrass fair trial — R.S.C., O.19 r.4.*

*Practice and Procedure — Interrogatories — Application by plaintiff for leave to deliver — R.S.C., O.31 r.2.*

The plaintiff was the administrator of one H deceased who was killed in a motor accident. The defendants were the driver and owner respectively of the car. The plaintiff in paragraph 17 of his statement of claim alleged that the first defendant on September 22, 1962 pleaded guilty to a charge under section 36(1) of the Road Traffic Ordinance and was fined $150. In their defence the defendants denied this allegation and the plaintiff repeated this allegation in paragraph 4 of his reply. The defendants now asked for paragraph 17 of the statement of claim and paragraph 4 of the reply to be struck out as tending to prejudice and embarrass a fair trial of the action, being irregular and not complying with O.19 r.4. The plaintiff applied on his part for leave to deliver certain interrogatories.

**Held:** (1) the first defendant's plea of guilt in the Magistrate's Court was only a subordinate fact and a means of proving the first defendant's negligence and therefore it should be struck out of the pleadings (*William* v. *Wilcox* (4) applied). Further the allegation that the first defendant was fined $150 being not a judicial order under sections 40, 41 and 43 of the Evidence Ordinance it must also be struck out of the pleadings;

(2) as the interrogatories were (as required under O.31 r.2) necessary for disposing fairly of this case and for saving costs they should be granted except that the words "and was fined $150" in the first interrogatory be deleted.

*Cases referred to:—*

(1) *Noor Mohamed* v. *Palanivelu & Anor.* [1956] M.L.J. 114.

(2) *A.E. Long* v. *Wong Chiu Wah and Ors.* [1957] M.L.J. 163.

(3) *Davy* v. *Garrett* (1878) 7 Ch. D. 473.

(4) *William* v. *Wilcox* 8 A. & E. p. 331.

(5) *Griebart* v. *Morris* [1920] 1 K.B. 659.

The following cases and authorities were also cited: *Bruce* v. *Odhams Press Ltd.* [1936] 1 All E.R. 287; *West Rand Central Gold Mining Co. Ltd.* v. *The King* [1905] 2 K.B. page 391, at page 400; *Re R. (deceased)* [1950] 2 All E.R. 117; *Hollington* v. *F. Hewthorn & Co. Ltd. & Anor.* [1943] 1 K.B. 587; 1957 *Annual Practice* 336; 1961 *Annual Practice* 448; *Mallal's* Supreme Court Practice, pages 241-2, 270, R.S.C., O.19, r.4 and O.31, rr.2 and 4.

CIVIL SUIT.

*Triptipal Singh* for the plaintiff.

*Chan Nyam Hoi* for the defendants.

**Suffian J.:** Haji Talib bin Lahim was run over and killed by car AB 1812 on the 16th January, 1962. The plaintiff as administrator claims damages for negligence against the first defendant who drove and against the second defendant who owned the car.

In paragraph 17 of his statement of claim, the plaintiff alleges that on the 22nd September, 1962 at the Kangar Magistrate's Court the first defendant pleaded guilty to a charge under section 36(1) of the Road Traffic Ordinance and was fined $150. In their defence both the driver and the owner denied this allegation. In his reply the plaintiff repeated this allegation, paragraph 4.

The two defendants ask that paragraph 17 of the statement of claim and paragraph 4 of the reply be struck out as being unnecessary and tending to prejudice and embarrass the fair trial of this action, being irregular and not complying with Order 19 rule 4.

The plaintiff for his part applies for leave to deliver to both defendants the following interrogatories:—

(1) Whether the 1st defendant pleaded guilty in the Magistrate's Court, Kangar, Perlis, to a charge under section 36(1) of the Road Traffic Ordinance in Kangar Magistrate's Court Arrest Case No. 73 of 1962 and was fined $150;

(2) whether the 1st defendant was in a line of a procession of about 15 cars at about 9.40 a.m. on the 16th day of January, 1962 at the 4½ milestone, Jalan Arau, Perlis;

(3) whether a police officer in a police land rover which was overtaking the 1st defendant shouted out to him to stop; and

(4) whether the front near-side mudguard was dented and the front windscreen was smashed.

I allow the defendants' application.

Order 19 rule 4 provides:—

"Every pleading shall contain, and contain only a statement in a summary form of the material facts on which the party pleading relies for his claim....., but not the evidence by which they are to be proved....."

The fact, if true, that the first defendant pleaded guilty to a charge under section 36(1) of the Road Traffic Ordinance, if in relation to this accident, would be admissible evidence because such a plea of guilt is a statement which suggests an inference — it is of course not conclusive — as to the first defendant's negligence and it is therefore an admission within the meaning of section 17(1) of the Evidence Ordinance No. 11 of 1950 and admissible under section 21 thereof. See also *Noor Mohamed* v. *Palanivelu & Anor.* (1) and *A.E. Long* v. *Wong Chiu Wah and Ors.* (2). But it is wrong to set out in the pleadings admissions made by one's opponents, *Davy* v. *Garrett* (3). Not all facts which tend to prove a fact in issue and are therefore relevant at the trial are "material facts" for pleading purposes. "It is an elementary rule in pleading that, when a state of facts is relied on, it is enough to allege it simply without setting out the subordinate facts which are the means of proving it, or the evidence sustaining the allegation" (*per* Lord Denman C.J. in *William* v. *Wilcox* (4)). The first defendant's plea of guilt in the Magistrate's Court is, in my opinion, only a subordinate fact and a means of proving the first defendant's negligence. I therefore order that it be struck out of the pleadings.

The allegation that the first defendant was fined $150 may be admitted in evidence only if the fining is a judicial order which may be proved under sections 40, 41 and 42 of the

Evidence Ordinance, but as it is not, I am bound by section 43 to exclude it. This allegation too must be struck out of the pleadings.

As to the plaintiff's application for leave to deliver interrogatories, I grant it as I consider that the interrogatories are, in the words of Order 31 rule 2, necessary for disposing fairly of this case and for saving costs except that the words "and was fined $150" in the first interrogatory be deleted. In *Griebart* v. *Morris* (5), Bankes L.J. at page 664 says:

> " There are.....two objects of interrogatories, one to obtain an admission and thus to support the interrogating party's case, and the other to destroy the opponent's case."

The interrogatories proposed to be delivered satisfy the first test. Bankes L.J. went on at the same page:—

> " There are however two well-known limitations upon the right to interrogate. It is not permissible to deliver interrogatories which are of a 'fishing' character or which seek to obtain the names of the opponent's witnesses."

Here neither of these limitations applies.

As regards costs, the plaintiff shall pay the costs of the defendants' application. The costs of the plaintiff's application shall be costs in the cause.

*Order accordingly.*

Solicitors: *Triptipal Singh; Cheang Lee & Ong.*

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## GULWANT SINGH v. ABDUL KHALIK

**[C.A. (Thomson C.J., Hill and Barakbah JJ.A.)**
**January 14, 1963]**

**[K.L. — F.M. Civil Appeal No. 47 of 1962]**

*Moneylending — Memorandum and promissory note — Execution of — Defendant denying having received amount specified in memorandum — Trial judge making contradictory statements in reviewing evidence — Retrial — Moneylenders Ordinance, 1951.*

*Evidence — Contradictory statements by trial judge in reviewing evidence — Course to be followed by appellate court in such cases.*

The plaintiff and the defendant executed a memorandum under section 16 of the Moneylenders Ordinance and a copy thereof and a promissory note and its copy before an advocate and solicitor. The plaintiff alleged that the debt was $2,500. The defendant in his defence denied that he received $2,500. In his judgment the trial judge stated: "As to the capital Miss Lim, her clerk P.W.3 and the plaintiff P.W.2 all stated that in fact $2,500, the amount stated in the document, was handed over to the defendant in Miss Lim's presence. She so certified in the promissory note P.I." The learned judge then went on to say: "I do not think Miss Lim and her clerk lied to the Court. Having accepted P.W.1's evidence as true,..... in my view it is quite probable that though $2,500 was in fact paid to the defendant in Miss Lim's presence,... $500 of the capital must have been returned by the defendant to the plaintiff."

**Held:** there was nothing on the record to support the finding of the trial judge. In view of the contradictory statements in the judgment of the trial judge and on the authority of the judgment of Lord Justice Mackinnon in *Vowles* v. *Armstrong-Siddeley Motors Ltd.* (1) at p. 802 there should be a retrial.

*Case referred to:—*

(1) *Vowles* v. *Armstrong-Siddeley Motors Ltd.* [1938] 4 All E.R. 796.

COURT OF APPEAL.

*S. D. K. Peddie* for the appellant.

*K. Chelvanayagam* for the respondent.

**Barakbah J.A.** (with whom **Thomson C.J.** and **Hill J.A.** agreed): This is an appeal against the decision of Suffian J. dismissing the claim of the appellant (plaintiff) with costs.

The brief facts are that on 26th March, 1959 the plaintiff and the defendant executed four documents before P.W. 1, an advocate and solicitor of the firm of Bannon & Bailey, Kuala Lumpur. The documents were a memorandum under section 16 of the Moneylenders Ordinance, 1951 and its copy and a promissory note and its copy.

The plaintiff alleged that the debt was $2,500 as stated in the promissory note and that the defendant made payments only in September, November and December, 1960 and in January, 1961 of $100 each. There was a balance of $2,925 including interest still due and the plaintiff filed a claim for that amount. Since filing this suit defendant paid another $100 in February, 1961. All these payments were made through plaintiff's solicitors, Messrs. Bannon & Bailey.

The plaintiff's evidence was supported by P.W. 1 and her clerk, P.W. 3 and P.W. 4. P.W. 1 in her evidence states: "I have no recollection whether in this case lender handed over $2,500 to defendant, but in every case in which I acted I would not sign any document unless I was certain both parties understood its contents and the actual amount was paid by lender to borrower in my presence." In cross-examination she denied that only $2,000 was paid by plaintiff to defendant in her presence. According to P.W. 3, "The money is given in my presence to P.W. 1 who counted it. It was then handed over to defendant who counted it. $2,500 was handed over."

The defendant in his defence denied that he received $2,500. In his evidence defendant stated: "Plaintiff told me before going to Bannon & Bailey that I would get $2,000 but must sign for $2,500. P.W. 1 counted $2,000, gave it to me, *but I told her that I had already received $500 earlier which was not true.*" It appeared that P.W. 1 was never cross-examined on this part of the evidence. The defendant further stated that he had paid $2,000 to the plaintiff. He was supported by his clerk, D.W. 2 who tendered the account book and his cashier, D.W. 3 who said that for three or four months some payments were made to P.W. 4. P.W. 4 admitted that when plaintiff went to India in 1960, he was appointed his attorney but denied that he ever collected or received any money from defendant during plaintiff's absence in India.